Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

TOMI WHITE BRYAN, Individually
and on behalf of all others similarly situated,

Petitioner,

v.

BELLSOUTH TELECOMMUNICATIONS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

AMIEL J. ROSSABI
FORMAN ROSSABI BLACK, P.A.
3623 North Elm Street
Suite 200
Greensboro, NC 27455
(336) 378-1899

MICHAEL G. WIMER*
3653 Sweeten Creek Road
Post Office Box 370
Arden, NC 28704
(828) 681-0998

* *Counsel of Record*

Counsel for Petitioner

190996

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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QUESTIONS PRESENTED

1. Whether a District Court's remand order declining to exercise supplemental jurisdiction over state law claims is appealable as a final order.

2. Whether federal question jurisdiction may be based on a preemption defense that does not completely preempt state law claims for deception.

3. Whether the filed-rate doctrine preempts state law claims for deception that do not attempt to enforce a promised rate different from the filed rate.

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Petitioner Tomi White Bryan ("Bryan") respectfully requests that this Court grant her petition for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is published at 377 F.3d 424 (4th Cir. 2004) and appears in the Petitioner's Appendix ("Pet. App."). Pet. App. 1a-27a. The opinion of the United States District Court for the Middle District of North Carolina, Greensboro Division, is unpublished. Pet. App. 28a-41a.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fourth Circuit issued its opinion and Judgment on July 28, 2004. On August 11, 2004, Bryan filed a timely motion for rehearing and for rehearing en banc. The motion for rehearing was denied on August 24, 2004. Pet. App. 42a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The claims under scrutiny appear in Count A of Plaintiff's First Amended Complaint. Those claims for deception were filed pursuant to the North Carolina Unfair and Deceptive Practices Act, North Carolina General Statutes § 75-1.1 ("NCUDPA"). Section 75-1.1(a) provides: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful."

Consumers injured by an unfair or deceptive act have standing to sue pursuant to N.C.G.S. § 75-16, which provides:

> If any person shall be injured or the business of any person, firm or corporation shall be broken up,

> destroyed or injured by reason of any act or thing done by any other person, firm or corporation in violation of the provisions of this Chapter, such person, firm or corporation so injured shall have a right of action on account of such injury done, and if damages are assessed in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict.

The Federal Communications Act ("FCA") requires telephone companies to file tariffs setting forth their interstate charges. The FCA contains three significant provisions relating to this case: 1) a prohibition on unreasonable or unjust charges; 2) the tariff filing requirement; and 3) a savings clause for state causes of action. 42 U.S.C. §§ 201(b), 203, and 414.

After dismissing the federal claims, the District Court declined to exercise supplemental jurisdiction over the state law claims in Count A and remanded those claims pursuant to 28 U.S.C. § 1367(c). Section 1367(c) provides:

> The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—
>
> (1) the claim raises a novel or complex issue of State law,
>
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
>
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
>
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

STATEMENT OF THE CASE

This case arises from BellSouth's misrepresentations and failure to disclose material facts relating to BellSouth's Federal Universal Service Charge ("FUSC"). The term "Federal Universal Service Charge" is BellSouth's label for recovering Universal Service Fund contributions from its customers, but it is not a label required by the Federal Communications Commission or one used by all carriers. BellSouth imposes the FUSC on each monthly telephone bill. Bryan, on behalf of herself and others similarly situated, filed her Complaint in North Carolina state court against BellSouth on February 22, 2002. Pet. App. 4a. BellSouth removed the case to federal court on March 26, 2002. Pet. App. 4a.

Bryan filed her First Amended Complaint on June 4, 2002, alleging causes of action for BellSouth's violation of the NCUDPA, unjust enrichment/restitution, and breach of contract. Pet. App. 4a-5a. Bryan also filed a motion to remand her claims to state court. BellSouth filed a motion to dismiss all claims in the First Amended Complaint, arguing that Bryan's claims were preempted by the "filed-rate doctrine." Pet. App. 5a-6a.

On February 6, 2003, the District Court granted BellSouth's motion to dismiss some of Bryan's claims. The District Court found that the claims challenging the FUSC as excessive arise under federal law and are preempted by the filed tariff doctrine. Pet. App. 33a-35a. The District Court denied BellSouth's motion to dismiss Bryan's deception claims, finding those claims do not challenge BellSouth's tariff, do not arise under federal law, and are not preempted by the FCA or filed-rate doctrine. Pet. App. 35-38a. The District Court declined to exercise supplemental jurisdiction over the state law claims for deception, and those claims were remanded. Pet. App. 39a. BellSouth appealed the District Court's decision remanding the state law claims. BellSouth contends the remand order constitutes a final appealable order under 28 U.S.C. § 1291.

BellSouth filed with the District Court and the Fourth Circuit Court of Appeals motions to stay the remand order pending appeal. Both motions were denied, and the case has proceeded in state court. The parties have conducted substantial discovery on the remanded deception claims. Bryan has filed a Second Amended Complaint.[1] The North Carolina Superior Court, Guilford County, denied BellSouth's motion to refer the case to the FCC pursuant to the primary jurisdiction doctrine. Further, the state trial court has certified a class of North Carolina consumers to pursue the claims under the NCUDPA, though class notice has not been affected.

On July 28, 2004, the Court of Appeals reversed the District Court's remand order. The Court of Appeals decided that Bryan's deception claims arise under federal law because the damage claim presumably seeks a refund of the USF surcharges, which implicates BellSouth's tariff. The Court of Appeals ordered the claims in Count A dismissed. The panel split its decision 2-1, with the Honorable J. Michael Luttig dissenting.

FACTUAL BACKGROUND

The Universal Service Fund ("USF") was created by Congress to provide funding for telecommunications services to rural areas, schools, libraries, and health care providers. 47 U.S.C. § 254. All carriers providing interstate telecommunications to the public, including BellSouth, are required to contribute to the USF. 47 C.F.R. § 54.706. The Federal Communications Commission ("FCC") administers the USF

1. The Second Amended Complaint eliminates those claims the District Court dismissed and elaborates upon the ways in which BellSouth misleads its customers about its FUSC. For example, Bryan alleges that BellSouth fails to inform its customers that it "marks up" its FUSC and that the FUSC includes BellSouth's administrative expenses, costs and/or profits. Bryan also alleges BellSouth leads its customers to believe its FUSC is a fee mandated by the federal government, which it is not.

and funds it through an assessment on carriers. Each quarter, the FCC establishes a uniform Contribution Factor, expressed as a percentage, that carriers must contribute to the USF. 47 C.F.R. § 54.709(a). For a local exchange carrier such as BellSouth, the assessment is made on interstate revenues, which consist of monthly subscriber line charges to its end-user customers. *Report and Order and Second Further Notice of Proposed Rulemaking*, FCC 02-329, 17 F.C.C.R. 24952, December 13, 2002, ¶ 51, n.131 ("*FCC Order of December 13, 2002*").

The FCA requires that all carrier charges and practices must be just and reasonable. 47 U.S.C. § 201(b). The FCC has jurisdiction to enact rules to ensure compliance by the carriers. *FCC Order of December 13, 2002*, ¶ 8. Until recently, many carriers, including BellSouth, charged their customers USF recovery fees exceeding the Contribution Factor imposed on the carriers by the FCC. *FCC Order of December 13, 2002*, ¶ 47, n.125. Further, the USF recovery practices among the carriers varied widely, causing consumer confusion about the amount and nature of the charge. *Id.* at ¶¶ 43-63. The FCC has stated: "This discrepancy between the contribution and the amount carriers charge customers is inexplicable to the casual observer." *In re Federal-State Joint Board on Universal Service*, FCC 01-0145, Notice of Proposed Rulemaking, May 8, 2001, ¶ 5. In effect, the carriers turned an FCC fee into a profit center by marking up the fee and imposing it on their customers.

In December 2002, after Bryan filed her First Amended Complaint and the briefing on the remand issues had been submitted to the District Court, the FCC banned USF mark-ups as a line item. *FCC Order of December 13, 2002*, ¶ 49. The ban took effect on April 1, 2003. *Id.* at ¶ 51. Though the FCC's ban was prospective, the FCC necessarily determined that USF surcharges in excess of the Contribution Factor are unreasonable and violate § 201(b) of the FCA. *FCC Order of December 13, 2002*, ¶ 43.

The FCC does not require carriers to recover their USF contributions from customers. "Each company makes a business decision about whether and how to assess customers to recover Universal Service costs." *Universal Service Fund Increases: What Every Consumer Should Know, FCC Consumer Fact Sheet, fcc.gov website,* October 30, 2004; *see also In The Matter of Truth-In-Billing And Billing Format*, FCC 99-72, First Report and Order and Further Notice of Proposed Rulemaking, May 11, 1999, 14 F.C.C.R. 7492, ¶ 57 ("*Truth-In-Billing Order*"). Before banning USF mark-ups, the FCC determined that

> we would not consider a description of that [USF] charge as being 'mandated' by the Commission or the federal government to be accurate . . . Accordingly, to state or imply that a carrier has no choice regarding whether or not such a charge must be included on the bill or the amount of the charge would be misleading.

Truth-In-Billing Order, at ¶ 57. Moreover, carriers "must be careful to convey information in a manner that does not mislead by omitting important information that indicates that the contributor has chosen to pass through the contribution or part of the contribution to its customers and that accurately describes the nature of the charge." *Universal Service Order*, 12 F.C.C.R. 8776, 9211-12 ¶ 855 (1997).

All of Bryan's claims challenging BellSouth's FUSC as excessive have been dismissed. In the remaining deception claims, Bryan alleges BellSouth has misrepresented facts and failed to disclose material information regarding its FUSC. BellSouth's deception prevented consumers from adequately comparing the cost of various telephone services and packages because BellSouth led consumers to believe the charge was government-mandated and that all carriers therefore imposed the same fee on their customers. Bryan seeks to recover damages on behalf of herself and similarly situated North Carolina

customers as a result of these deceptive acts. Bryan is not seeking to rewrite BellSouth's tariffs or to enforce a promised rate that differs from the tariff.

REASONS FOR GRANTING THE PETITION

At its core, this case presents novel and complex issues delineating the role of federal courts in resolving state law deception claims and defining the scope of federal question jurisdiction based on preemption. The decision of the Fourth Circuit Court of Appeals, with the Honorable J. Michael Luttig dissenting, conflicts with other appellate decisions holding that deception claims concerning a telephone company's billing practices do not raise federal questions. *See Fax Telecomms., Inc. v. AT&T*, 138 F.3d 479 (2d Cir. 1998); *In re Long Distance Telecomms. Litig.*, 831 F.2d 627, 633 (6th Cir. 1987).

By representing that its FUSC is a federally-mandated fee, BellSouth leads its customers to believe that the FUSC is akin to a tax imposed by the government, which it is not. Though only a small surcharge was imposed monthly on BellSouth's customers, BellSouth has gained tens of millions of dollars through its deception. The FCC has declared these surcharges illegal and encouraged the states to regulate disclosures and billing practices. The Fourth Circuit Court of Appeals effectively nullified the FCC's policy declarations and cut off the very consumer remedy the FCC and Congress guaranteed. The scope of federal question jurisdiction based on a preemption defense and the application of the filed-rate doctrine to preclude state law attacks on billing practices are important questions of federal law that should be settled by this Court.

This Court should grant the petition for a writ of certiorari for three reasons.

First, the consideration of the District Court's remand order by the Court of Appeals violates the express language of

28 U.S.C. § 1447. Reviewing such a remand order usurps the district courts' discretion to decline to exercise supplemental jurisdiction over state law claims. The Court of Appeals' decision dramatically impedes and delays the resolution of state claims by providing interlocutory appeals of all remand orders in which the trial court declines to exercise supplemental jurisdiction.

Second, the Court of Appeals' ruling enables all state law claims to be removed based on an ordinary preemption defense. This Court repeatedly has limited the right of removal based on federal preemption and rebuffed attempts to federalize state law claims through defenses not appearing on the face of a complaint. The Court of Appeals' decision contravenes this long line of precedent.

Finally, the Court of Appeals expanded the preemptive effect of the filed-rate doctrine to immunize all carriers from liability for deception, even when the FCC has declared their surcharges and billing practices unreasonable. This decision conflicts with the Court's seminal ruling in *Central Office* that the filed-rate doctrine only bars claims that seek to impose a rate different from the filed rate. *AT&T v. Central Office Tel., Inc.*, 524 U.S. 214, 118 S. Ct. 1956, 141 L. Ed. 2d 222 (1998). In enacting the FCA, Congress preserved common law and state statutory claims. The FCC has encouraged the states to provide consumer protection in the area of billing disclosures. If a purpose of the filed-rate doctrine is to preserve the regulatory body's rate-setting authority, and that regulator has decided the rates are unreasonable and that claims for consumer deception do not infringe upon its authority, the filed-rate doctrine does not preclude the deception claims.

I. THE REMAND ORDER IS NOT APPEALABLE BECAUSE IT IS NOT A FINAL ORDER.

The Court of Appeals determined that, although Count A of Plaintiff's complaint was remanded to state court, the District Court's remand order was a final appealable order. Pet. App. 7a-8a. The Court of Appeals based its decision on *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 116 S. Ct. 1712, 135 L. Ed. 2d 1(1996). Petitioner respectfully submits that the *Quackenbush* decision does not stand for the proposition that this type of remand order is appealable as a final order. Further, 28 U.S.C. § 1447(d) prohibits an appeal from a remand order declining to exercise supplemental jurisdiction of state law claims.

28 U.S.C. § 1447(d) provides: "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise. . . ." In *Quackenbush*, this Court held that orders remanding claims based on *Burford* abstention are appealable final orders. Notably, subject-matter jurisdiction in *Quackenbush* was based on diversity of citizenship, and in remanding the case to state court based on abstention principles, the trial court acknowledged it had subject-matter jurisdiction of the dispute. Though permitting appeal of the nonfinal order in *Quackenbush*, this Court held that § 1447(d) bars appeals from nonfinal remand orders based on lack of subject-matter jurisdiction or defects in removal procedure. 517 U.S. at 712.

In the case *sub judice*, the District Court remanded Count A to state court, declining to exercise supplemental jurisdiction over those state claims pursuant to 28 U.S.C. § 1367(c)(3). Pet. App. 38a-39a. Section 1367(c)(3) provides that district courts may decline to exercise supplemental jurisdiction over state law claims if "the district court has dismissed all claims over which it has original jurisdiction." In declining to exercise supplemental jurisdiction, the District Court necessarily concluded that it had dismissed all claims over which it had original subject-matter jurisdiction and that it did not have

original subject-matter jurisdiction over Count A of Plaintiff's complaint. Pet. App. 38a-39a. The District Court explicitly found that the remanded claims do "not raise a federal question." Pet. App. 38a.

Thus, the District Court remanded Bryan's state law deception claims because it did not have original subject-matter jurisdiction over those claims. This decision is not appealable. 28 U.S.C. § 1447(d). The Congressional intent and policy reasons prohibiting appeal from a decision to remand for lack of subject-matter jurisdiction in the first instance are no less potent when the remand order is based on a refusal to exercise supplemental jurisdiction over state claims after the federal claims have been dismissed. As such, appellate review of the District Court's non-final remand order is prohibited under 28 U.S.C. § 1447(d)

II. BRYAN'S STATE LAW CLAIMS DO NOT ARISE UNDER FEDERAL LAW.

It cannot be disputed that Bryan's state law claims for violation of the NCUDPA do not state a claim for relief under federal law. Though Bryan could have pursued claims under the Federal Communications Act based on the FCC's declaration that USF surcharges are unreasonable, Bryan chose to cast her claims under state law only. The Court of Appeals found federal question jurisdiction based on a preemption defense that does not appear in Bryan's complaint and is not an element of the deception claims. Although the Court of Appeals acknowledged that Bryan has not pleaded any particular measure of damage, it nevertheless concluded that any measure of damage would require the trial court to determine the "reasonable rate" BellSouth should have charged. According to the majority opinion, this phantom damage model, supplied by BellSouth and not by Plaintiff, transmogrifies Count A of the complaint into a preempted attack on BellSouth's tariff. Pet. App. 16a.

As Judge Luttig wrote in dissent, Count A of the complaint does not entail resolution of any question of federal law. Pet. App. 17a. Rather, the only federal question in the case appears not in the complaint, but by virtue of BellSouth's preemption defense. This Court has settled the question of whether a preemption defense can be the basis for removal.

> Thus, it is now settled law that a case may *not* be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue.

Caterpillar, Inc. v. Williams, 482 U.S. 386, 393, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (1987) (emphasis original).

"[A] defense that relies on the preclusive effect of a prior federal judgment, or the pre-emptive effect of a federal statute, will not provide a basis for removal." *Beneficial Nat'l. Bank v. Anderson,* 539 U.S. 1, 6, 156 L. Ed. 2d 1, 123 S. Ct. 2058 (2003) (citations omitted). State claims "may be removed to federal court in only two circumstances – when Congress expressly so provides . . . or when a federal statute wholly displaces the state-law cause of action through complete pre-emption." *Id.* at 8 (citation omitted).

"Complete preemption functions as a narrowly drawn means of assessing federal removal jurisdiction, while ordinary preemption operates to dismiss state claims on the merits and may be invoked in either federal or state court." *Smith v. GTE Corp.*, 236 F.3d 1292, 1313 (11th Cir. 2001). Further, a preemption defense cannot transmute Bryan's claims into an action arising under federal law unless federal law supplies the exclusive cause of action against BellSouth for deception in connection with its FUSC. *See Beneficial Nat'l. Bank,* 539 U.S. at 9. The question is one of Congressional intent. *Id.* at n.5

In enacting the Federal Communications Act, Congress did not intend the FCA to completely preempt state law causes of action. *Smith v. GTE Corp.*, 236 F.3d 1292, 1312-13 (11th Cir. 2001). The majority of courts that have addressed preemption in the wire-line context have held that Congress did not intend the FCA to completely preempt state law claims so as to make them removable. *E.g., Freeman v. Burlington Broadcasters, Inc.*, 204 F.3d 311, 317 (2d Cir. 2000) ("In the FCA context, we have ruled that the 'complete preemption' doctrine does not apply with respect to state law billing claims."); *In re Long Distance Telecomms. Litig.*, 831 F.2d 627, 633 (6th Cir. 1987) (claims for misrepresentation and deception are not federal in character, even though a filed rate is involved); *Russell v. Sprint Corp.*, 2003 U.S. Dist. LEXIS 8852 n.1 (D. Kan. May 22, 2003) (collecting cases).

In light of this Court's recent decision in *Beneficial*, the viability of removal jurisdiction based on a substantial question of federal law, not appearing in a complaint, is tenuous at best. Here, the majority concluded that Bryan's deception claims are federal because "the only plausible reading of the Complaint is that Count A, like the other counts, seeks a refund of a portion of the FUSC." Pet. App. 16a.

Nowhere in the Complaint does Bryan seek a "refund" of all or a portion of the filed rate. In fact, the majority admits that "[i]n actuality, Bryan does not specify the nature of her damages in Count A." Pet. App. 13a. Under the "Damages" section of the Complaint, Bryan alleges that "BellSouth's actions and omissions have been an actual, producing, direct and proximate cause of damages to Plaintiff and to BellSouth's other North Carolina customers in an amount exceeding $10,000.00." Pet. App. 25a, n.2. Additionally, Bryan seeks treble damages under § 75-16 of the NCUDPA. Pet. App. 25a, n.2. The majority superimposed a refund measure of damage on the Complaint and then deemed that the claims for deception therefore sought to alter the tariff. Pet. App. 13a-16a. As Judge Luttig wrote,

"[t]his is error, plain and simple." Pet. App. 21a. "Jurisdiction may not be sustained on a theory that the plaintiff has not advanced." *Merrell Dow Pharmaceuticals v. Thompson*, 478 U.S. 804, 809 n.6, 106 S. Ct. 3229, 92 L. Ed. 2d 650 (1986) (citation omitted).

The precise question before this Court is whether a damage measure that does not appear in a complaint can cause pure state law deception claims to arise under federal law. At oral argument, Bryan suggested an example of a damage measure that would not challenge the tariff. Pet. App. 25a. The majority dismissed this example as "purely hypothetical." Pet. App. 15a. And though the majority acknowledged Bryan specified no measure of damage, it nevertheless supplied a hypothetical damage model suggested by BellSouth to dismiss Count A. Such an imposition certainly does violence to the well-settled rule that the Plaintiff is master of her own pleadings. *See Caterpillar, Inc. v. Williams*, 482 U.S. at 388-89.

The majority's conclusion is erroneous for three reasons.

First, assuming *arguendo* federal jurisdiction may be predicated on the need to resolve a substantial question of federal law, the federal question must appear on the face of the complaint itself. A federal question may not be created by a federal preemption defense. *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 10, 103 S. Ct. 2841, 78 L. Ed. 2d 420 (1983); *Smith v. GTE Corp.*, 236 F.3d 1292, 1310-11 (11th Cir. 2001). The "refund damage model" found to conflict with BellSouth's tariff was supplied by BellSouth and the majority, but it does not appear on the face of the Complaint. "Bryan does not specify the nature of her damages in Count A." Pet. App. 13a. A damage measure superimposed upon the Complaint by a defendant or a court cannot form the basis for federal question jurisdiction.

Second, although the Court of Appeals acknowledges that federal question jurisdiction and the filed-rate doctrine are not coextensive, it merges the inquiry in this case. Pet. App. 21a-22a. The Court of Appeals confused ordinary preemption, a defense that can be asserted in state or federal court, with complete preemption, which entitles a defendant to remove the claims. *See Smith v. GTE Corp.*, 236 F.3d 1292, 1313 (11th Cir. 2001). In reversing the District Court's remand of the state law claims, the majority effectively ruled that Bryan's deception claims are *completely preempted* by the filed-rate doctrine, a conclusion not supported by the Federal Communications Act or any other legal authority. The filed-rate doctrine is simply a defense to Plaintiff's claims. It is well-settled that "[a] defense that raises a federal question is inadequate to confer federal jurisdiction." *Merrell Dow Pharmaceuticals*, 478 U.S. at 808.

Third, in its analysis, the majority stresses the FCC's right to set the amount of the tariff. "[A]uthorizing a court to award damages that would effectively impose a rate different from that dictated by the tariff would usurp the FCC's authority to determine what rate is reasonable." Pet. App. 11a-12a. In fact, the FCC has determined that USF mark-ups such as those imposed by BellSouth on its customers are unreasonable. *FCC Order of December 13, 2002*, ¶ 49. The FCC also stated that the filed-rate doctrine does not apply to a carrier's public disclosure requirements because those requirements are not part of the filed rate. *In re Policy and Rules Concerning the Interstate, Interexchange Marketplace*, FCC 99-47, 14 FCC Rec. 6004, March 31, 1999, ¶ 17. The filed rate is the amount to be charged, not the ancillary disclosures necessary to prevent deception of consumers. BellSouth has conceded that its tariff does not address the billing and marketing practices at the heart of the Complaint. Pet. App. 23a. Bryan does not seek to repudiate the FCC's rate-making authority; to the contrary, Bryan seeks to uphold the FCC's determinations through enforcement of state laws protecting consumers. Because BellSouth's tariff does not encompass consumer disclosures, as the FCC determined and

BellSouth has admitted, state claims for nondisclosure cannot be barred by the filed-rate doctrine and are not federal in character.

Bryan's claims for deception and misrepresentation are not completely preempted, and her right to relief does not depend upon resolution of a substantial question of federal law. Therefore, the federal courts do not have jurisdiction to decide Bryan's claims for violation of the North Carolina Unfair and Deceptive Practices Act.

III. THE FILED-RATE DOCTRINE BARS CLAIMS THAT ATTEMPT TO VARY A TARIFF.

Even if this Court were to determine that Bryan's claims for deception implicate BellSouth's tariff, the filed-rate doctrine does not preempt her claims. The filed-rate doctrine bars judicial rate setting and preferential treatment through non-tariffed side agreements, but does not insulate carriers from all liability, including liability under state laws that do not conflict with a tariff. This Court elucidated the point in *AT&T v. Central Office Tel., Inc.*, 524 U.S. 214, 118 S. Ct. 1956, 141 L. Ed. 2d 222 (1998).

In *Central Office*, plaintiff filed suit in federal court alleging that AT&T had failed to deliver promised rates and billing options to plaintiff, a telecommunications reseller. AT&T argued the promised rates were not enforceable because they differed from the rates set forth in AT&T's tariff. Because the plaintiff was attempting to enforce a promised rate inconsistent with the tariff rate, the Court held that the filed-rate doctrine bars claims that would "constitute unlawful preferences or that directly conflict with the tariff." 524 U.S. at 227-28.

In Chief Justice Rehnquist's concurring opinion, he emphasized that the filed-rate doctrine does not bar all state law claims:

> Central to that antidiscriminatory policy is the notion that all purchasers of services covered by the tariff will pay the same rate. The filed-rate doctrine furthers this policy by disallowing suits brought to enforce agreements to provide services on terms different from those listed in the tariff. This ensures that the tariff governs the terms by which the common carrier provides those services to its customers. It is crucial to note, however, that this is all the tariff governs. In order for the filed-rate doctrine to serve its purpose, therefore, it need pre-empt only those suits that seek to alter the terms and conditions provided for in the tariff.

524 U.S. at 229 (Rehnquist, C.J., concurring).

It is significant that the FUSC imposed by BellSouth is not a charge for any service provided by BellSouth to that customer. The customer gets no direct benefit or service in exchange for paying the FUSC to BellSouth. FUSC fees paid to BellSouth go into the Universal Service Fund, from which BellSouth and other carriers are paid to provide telecommunications services to rural areas, schools, libraries, and health care providers. In fact, BellSouth has received from the USF hundreds of millions of dollars more than BellSouth has contributed to the USF.[2]

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2. Since the case was remanded, Bryan has taken several depositions and reviewed and analyzed voluminous documents in which she discovered this and other deceptions by BellSouth concerning the FUSC. The very nature of the deception and concealment claims in this case prevented Bryan from discovering this information in advance of filing the First Amended Complaint which is at issue.

Though BellSouth includes the amount of the FUSC in its tariff, BellSouth admits the tariff does not address the disclosure and marketing issues about which Bryan complains. Pet. App. 23a. In making its ruling, the Court of Appeals ignored BellSouth's admission and a plethora of recent federal decisions holding that the filed-rate doctrine does not preempt state law claims for deception and misrepresentation which do not directly attack the *amount* of a filed rate. *See Freeman v. Burlington Broadcasters, Inc.*, 204 F.3d 311, 317 (2d Cir. 2000) ("In the FCA context, we have ruled that the 'complete preemption' doctrine does not apply with respect to state law billing claims."); *In re Long Distance Telecomms. Litig.*, 83. F.2d 627, 633 (6th Cir. 1987); *Russell v. Sprint Corp.*, 2003 U.S. Dist. LEXIS 8852 (D. Kan. 2003); *In re Universal Service Fund Tele. Billing Practices Litig.*, 247 F. Supp. 2d 1215, 1232 (D. Kan. 2002); *Braco v. MCI WorldCom Comms., Inc.*, 138 F. Supp.2d 1260, 1269 (C.D. Cal. 2001); *Crump v. WorldCom, Inc.*, 128 F. Supp. 2d 549 (W.D. Tenn. 2001); *Minnesota v. WorldCom, Inc.*, 125 F. Supp.2d 365, 371 n.6 (D. Minn. 2000); *Bauchelle v. AT&T*, 989 F. Supp. 636 (D. N.J. 1997) (§§ 201, 202 and 203 of the FCA do not apply to state law challenges to carrier's advertising and promotion practices); *Sanderson, Thompson, Ratledge & Zimny v. AWACS, Inc.*, 958 F. Supp. 947 (D. Del. 1997) (claims that carrier did not accurately disclose billing practice not governed by FCA); *In re Comcast Cellular Telecomms. Litig.*, 949 F. Supp. 1193 (E.D. Pa. 1996) (claims that carrier failed to accurately disclose billing practice not governed by FCA).

The Sixth Circuit Court of Appeals found that state law claims that do not attack the amount of a tariffed rate are outside the scope of preemption under the filed-rate doctrine. *In re Long Distance Telecomms. Litig.*, 831 F.2d 627, 628 (6th Cir. 1987). In *In re Long Distance*, plaintiffs claimed the carrier misrepresented its rates as lower than its competitors and did not reveal that it charged customers for uncompleted calls. The Sixth Circuit held that the filed rate doctrine did not bar the

consumer law claims, because plaintiffs did not seek to change the filed rates. *Id.* at 633-34. As in *Central Office*, *In re Long Distance* concerned the application of the filed-rate doctrine as a preemption defense in a case originally filed in federal court. Because state law claims for deception and misrepresentation are not preempted by the filed-rate doctrine, they cannot be completely preempted so as to convert them into federal claims for purposes of subject-matter jurisdiction.

The preemption issues in this case are identical to a recent suit filed by the Missouri Attorney General challenging cellular providers' fraudulent characterization of rate increases as government-mandated charges. *State ex rel. Nixon v. Nextel W. Corp.*, 248 F. Supp.2d 885 (E.D. Mo. 2003). In that case, the State of Missouri filed claims against Nextel and Sprint under the Missouri Merchandising Practices Act, seeking an injunction and statutory damages because defendants characterized an increase in rates as a tax or fee mandated by the federal government. *Id.* at 887. The case was removed by the defendants to federal court on the ground that the claims were preempted by federal law or raised a substantial federal question under the FCA. The defendants also filed a motion to dismiss Missouri's claims on the same grounds. These are the identical arguments made by BellSouth in the case at bar. The District Court denied the motions to dismiss and remanded all of the claims to state court, finding that "every cased cited by [the] parties and found by this Court in independent research indicated that the type of fraud non-disclosure claims asserted by plaintiff are not preempted by the FCA and do not support removal." *Id.* at 894.

The Supreme Court has made it "clear that the filed-rate doctrine applies only where the policy of nondiscrimination in rates is implicated." *Advamtel, LLC v. AT&T*, 118 F. Supp. 2d 680, 686 (E.D. Va. 2000) (*citing Central Office Tel.*, 524 U.S. at 222-23). "In other words, deviations from the filed tariff that do not result in rate discrimination are not barred by the filed-rate doctrine." *Advamtel*, 118 F. Supp. 2d at 686.

In *Central Office*, the Court ruled that the century-old filed-rate doctrine applicable to the Interstate Commerce Act's tariff provisions also applies to tariffs filed under the Federal Communications Act. 524 U.S. at 22.

> Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, **unless it is found by the Commission to be unreasonable**.

Id., quoting *Louisville & Nashville R. Co. v. Maxwell,* 237 U.S. 94, 97, 35 S. Ct. 494, 59 L. Ed. 853 (1915) (emphasis supplied).

The FCC already has determined that USF mark-ups such as those imposed by BellSouth are unreasonable, and the FCC prohibited the mark-ups effective April 1, 2003. *FCC Order of December 13, 2002*, ¶ 49. In explaining the basis for its decision, the FCC wrote: "We also noted that, in looking at whether the current system was effective in carrying out the Act, we must balance the duty to make sure the collection process is fair and reasonable to consumers with the need to give carriers maximum flexibility to respond to market forces." *Id.* at ¶ 43. The prospective nature of the FCC's ban on USF surcharges does not change the FCC's conclusion that charges imposed in excess of the Contribution Factor are unreasonable:

> Based on our experience over the course of the last three years, we believe it is necessary to provide greater clarity about the practices we deem reasonable to protect consumers. In light of the changes to the contribution methodology adopted herein, we conclude that the practice of marking up federal universal service line-item charges above the relevant assessment will be prohibited prospectively.

Id. at ¶ 49. Based on the FCC's decision, it would not be necessary for any court, whether state or federal, to determine the reasonable rate BellSouth or other carriers should have charged to recover their USF contributions. That conclusive determination already has been made by the FCC.

Even if Bryan's claims could be characterized as seeking a refund, the damage amount would be calculated in reference to BellSouth's deception. Pet. App. 24a. As Judge Luttig wrote: "Even if the *consequence* of awarding such damages would be to *effectively* lower the rates for some customers and not for others, the determination of damages would not 'necessarily depend' on the court's determination off the reasonableness of the rate. . . ." Pet. App. 24a. *Accord Minnesota v. WorldCom, Inc.*, 125 F. Supp.2d 365, 371-72 (D. Minn. 2000) (finding no complete preemption of claims for restitution of collected tariffs in violation of deceptive practice statutes).

BellSouth's tariff includes the method of calculation and the monthly amount to be imposed per telephone line. However, the tariff fails to disclose that BellSouth is not required to assess the FUSC upon consumers or that BellSouth imposes a charge that exceeds the contribution factor and includes expenses and profits. In its billing statements and other written and oral communications to customers, BellSouth inaccurately leads customers to believe its FUSC is a federally mandated charge and that all of the FUSC is paid into the USF. BellSouth does not deny, as it cannot, that it "marked up" its FUSC for years and that the practice is now prohibited by the FCC. Unlike the plaintiff in *Central Office*, Bryan does not allege that BellSouth promised her a lower or different FUSC, and Bryan is not attempting to enforce a promised or contractual rate different from that contained in the tariff. Any damages awarded to Bryan or the putative class based on BellSouth's deceptive conduct would not have the effect of setting a rate different from the tariffed rate.

In its opinion, the Court of Appeals stresses the inviolability of federally filed tariffs "approved" by the FCC. Pet. App. 11a-12a. The regulator's turf, so to speak, is a central theme in the federal cases deciding the preemptive effect of the filed-rate doctrine and whether such cases should be referred to the regulator under the doctrine of primary jurisdiction. In this context, it is important to illuminate the FCC's public positions on these issues.

FCC Billing Guidelines

The FCC has issued general guidance on the organization and content of consumer telephone bills: (1) bills must be clearly organized; (2) charges must be accompanied "by a brief, clear, non-misleading, plain language description of the service or services rendered;" and (3)

> [t]he description must be sufficiently clear in presentation and specific enough in content so that customers can accurately assess that the services for which they are billed correspond to those that they have requested and received, and that the costs assessed for those services conform to their understanding of the price charged.

47 C.F.R. § 64.2401.

The FCC has encouraged states to pass billing disclosure rules, as long as those rules do not conflict with the FCC rules. The Truth-In-Billing requirements "are not intended to preempt the adoption or enforcement of consistent truth-in-billing requirements by the states." 47 C.F.R. § 64.2400(c).

Description of the USF Recovery Charge

In a recent order, the FCC declined to specify any particular label for USF recovery charges. "At this time, we decline to mandate a specific label for federal universal service line-items

pursuant to our Truth-in-Billing rules." *FCC Order of December 13, 2002*, ¶ 65. The FCC also determined that carrier invoices that imply that USF charges are mandated by the government constitute a misrepresentation:

> A full, accurate and non-misleading description of the charge would be consistent with our guideline. In contrast, we would not consider a description of that charge as being "mandated" by the Commission or the federal government to be accurate. Instead, it is the carriers' business decision whether, how, and how much of such costs they choose to recover directly from consumers through separately identifiable charges. Accordingly, to state or imply that the carrier has no choice regarding whether or not such a charge must be included on the bill or the amount of the charge would be misleading.

Truth-in-Billing Order at ¶ 57; *see* Universal Service Order, 12 FCC Rcd 8776, 9211-12 ¶ 855 (1997) (noting that carriers "must be careful to convey information in a manner that does not mislead by omitting important information that indicates that the contributor has chosen to pass through the contribution or part of the contribution to its customers and that accurately describes the nature of the charge").

The FCC recently reaffirmed this view: "We conclude it is unreasonable to describe an amount as a universal service regulatory fee when that amount varies from the contribution factor mandated by the regulator." *FCC Order of December 13, 2002, at ¶ 54*. Nothing in the FCC's ruling precludes consumers from seeking damages based on such a deception.

Applicability of the Filed-Rate Doctrine

The FCC also ruled that the filed-rate doctrine does not apply to public disclosure requirements because those

requirements are not part of the filed rate. *In re Policy and Rules Concerning the Interstate, Interexchange Marketplace*, FCC 99-47, 14 FCC Rec. 6004, March 31, 1999, ¶ 17. Moreover, the FCC has rejected suggestions that it address USF collection and disclosure issues on a case-by-case basis:

> [W]e conclude that the practice of marking up federal universal service line-item charges above the relevant assessment amount will be prohibited prospectively. We reject proposals to address such practices on a case-by-case basis through enforcement proceedings. Using our enforcement authority to address such a systemic problem would not be an efficient use of the Commission's resources.

FCC Order of December 13, 2002, ¶ 49.

These positions necessarily lead to the conclusion that the FCC views this vast regulatory terrain as capable of accommodating both FCC and state oversight. Further, the FCC's refusal to use its enforcement powers to address the "systemic problem" of USF overcharges is essentially a deferral to the states' consumer protection laws. North Carolina's Unfair and Deceptive Practices Act is a law requiring fair and accurate disclosures to consumers, a requirement that is consistent with the FCC guidelines. Because the FCC decided that state enforcement of billing disclosures regarding USF surcharges does not invade its regulatory authority or impugn the integrity of tariffed rates, that decision should be honored by the courts. Any action that a state court might take in this case would not substitute judicial judgment for the FCC's judgment that USF surcharges are unreasonable.

CONCLUSION

The issues raised in the petition are of significant importance to the jurisdiction of the state and federal courts and the interplay between state laws of deception and the FCC's regulatory authority. The Courts of Appeals have issued conflicting opinions on the application of the filed-rate doctrine to state law claims for misrepresentation and deception, and the Supreme Court should resolve the conflict. Bryan respectfully requests that the Petition be granted.

Respectfully submitted,

AMIEL J. ROSSABI
FORMAN ROSSABI BLACK, P.A.
3623 North Elm Street
Suite 200
Greensboro, NC 27455
(336) 378-1899

MICHAEL G. WIMER*
3653 Sweeten Creek Road
Post Office Box 370
Arden, NC 28704
(828) 681-0998

* *Counsel of Record*

Counsel for Petitioner

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DECIDED JULY 28, 2004

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 03-1316

TOMI WHITE BRYAN, individually and on behalf of all others similarly situated,

Plaintiff-Appellee,

v.

BELLSOUTH COMMUNICATIONS, INCORPORATED,

Defendant-Appellant.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Frank W. Bullock, Jr., District Judge. (CA-02-228-1)

Argued: February 24, 2004

Decided: July 28, 2004

Before LUTTIG, KING, and GREGORY, Circuit Judges.

Appendix A

OPINION

KING, Circuit Judge:

Defendant BellSouth appeals from the portion of a decision of the Middle District of North Carolina denying dismissal and remanding one of plaintiff Tomi Bryan's three claims to state court. *Bryan v. Bellsouth Telecomms., Inc.*, No. 1:02CV00228, 2003 WL 262333 (M.D.N.C. Feb. 6, 2003). The court concluded that certain of Bryan's claims arose under federal law and were subject to dismissal under the "filed-rate doctrine." It declined to exercise supplemental jurisdiction and remanded to state court a single claim that it determined did not raise a federal question. BellSouth maintains that the court erred in failing to conclude that all of Bryan's claims posed federal questions and were barred by the filed-rate doctrine. For the reasons explained below, we vacate and remand.

I.

A.

BellSouth, as a provider of interstate public telecommunications services, is required by law to contribute a portion of its revenues to the federal Universal Service Fund ("USF") to ensure affordable telecommunications services to rural and low-income areas, schools, hospitals, and the like. *See* 47 U.S.C. § 254; 47 C.F.R. § 54.706(a). The percentage of its revenues that a carrier must contribute to the USF is established by the Federal Communications Commission ("FCC") and is adjusted on a quarterly basis to ensure sufficient funding of the USF. *See* 47 C.F.R. § 54.709(a).

Appendix A

The FCC permits telecommunications carriers such as BellSouth to recover the costs of their contributions to the USF from their customers, either through increased rates or through a separate line item on the customers' bills. *See* In the Matter of Federal-State Joint Board on Universal Service, 17 F.C.C.R. 24952, ¶ 42 (2002). Prior to April 1, 2003, certain carriers who recovered their USF contributions through line items would charge customers significantly more than the contribution required based on their bills. *Id.* ¶ 46. These carriers attributed the need for such "marking up" to "the lag between the reporting and assessment of revenues, uncollectibles, and administrative costs." *Id.* In an effort to "address consumer concerns regarding disparate contributor recovery practices," *id.* ¶ 40, the FCC forbade marking up the line-item charge, effective April 1, 2003. *Id.* ¶ 45.

Billing practices such as recovery of USF contributions are established in a carrier's "Schedule of Charges," *see* 47 U.S.C. § 203, also known as its "tariff." A carrier's tariff must be filed with the FCC and kept open for public inspection.[1] *Id.* § 203(a). In addition, a carrier may not charge more or less than the rates set forth in its tariff, and it may not refund or remit to a customer any of the charges contained in the tariff. *Id.* § 203(c).

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1. The Federal Communications Act provides that each common telecommunications carrier "shall . . . file with the [FCC] and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication ... and showing the classifications, practices, and regulations affecting such charges." 47 U.S.C. § 203(a).

Appendix A

As reflected in its tariff, BellSouth chooses to recover its USF contribution from its customers through a line item on the customers' bills, which it denotes as the "Federal Universal Service Charge" ("FUSC"). The applicable tariff establishes the portion of BellSouth's USF contribution that will be recovered from customers, and it calculates, based on the number of telephone lines and the amount sought to be recovered, that the end user of each line will be charged an FUSC of $0.53 per month.

B.

On February 22, 2002, Bryan filed suit against BellSouth in the Superior Court of Guilford County, North Carolina, seeking to represent a class of individuals who are BellSouth customers and who paid the FUSC. Bryan alleged that the FUSC was excessive and that Bell-South had failed to disclose certain information pertaining to the FUSC, in violation of North Carolina's unfair trade practices law.

On March 26, 2002, BellSouth removed the suit to the Middle District of North Carolina, pursuant to 28 U.S.C. §§ 1441 and 1446, on the basis that Bryan's claims raised federal questions by challenging BellSouth's tariff. On June 4, 2002, Bryan filed her First Amended Complaint (the "Complaint") in federal court, seeking to sue on behalf of all North Carolina BellSouth customers who paid the FUSC. The Complaint alleged that BellSouth imposes an FUSC that exceeds its required contribution to the USF, that BellSouth does not disclose how it calculates the FUSC, and that BellSouth's use of the term "Federal Universal Service Charge" is misleading.

Based on these allegations, Bryan asserted three separate causes of action. In Count A, she claimed that BellSouth committed unfair and deceptive trade practices, in violation of North Carolina General Statute section 75-1.1, by failing to disclose: (1) how it calculates the FUSC; (2) that it charges customers an amount well in excess of its contribution to the USF for North Carolina services; and (3) that the FUSC includes administrative expenses, costs, and profits.[2] Count A further alleged that BellSouth's use of the term "Federal Universal Service Charge" is unfair or deceptive, as is its representation to customers that the FUSC is paid to the USF. In Count B, Bryan brought a claim for unjust enrichment/restitution, contending that BellSouth unjustly enriched itself by imposing an excessive and unlawful FUSC. In Count C, Bryan alleged breach of the covenant of good faith and fair dealing based on BellSouth's charging an excessive FUSC and failing to make the disclosures described in Count A. Based on these claims, the Complaint sought damages in an amount exceeding $10,000 but less than $74,999 per class member.[3]

On June 10, 2002, Bryan filed a motion to remand the Complaint to state court, *see* 28 U.S.C. § 1447, and, on July 3, 2002, BellSouth filed a motion, pursuant to Federal Rule of Civil Procedure 12(b)(6), to dismiss the Complaint for failure

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2. North Carolina General Statute section 75-1.1(a) provides that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful."

3. Although Bryan seeks, in her Complaint, to represent a class of similarly situated customers, no determination has been made regarding the class status of this dispute.

to state a claim upon which relief can be granted. In support of its motion to dismiss and in opposition to Bryan's motion to remand, BellSouth maintained that all of Bryan's claims were barred by the "filed-rate doctrine" in that they challenged BellSouth's filed tariff or, in the alternative, that they should be heard first by the FCC under the doctrine of primary jurisdiction.

On February 6, 2003, the court issued its Memorandum Opinion addressing the parties' contentions. *Bryan*, 2003 WL 262333 (the "Opinion"). On that same date, the court entered the Order from which this appeal is taken (the "Order"). In its Opinion, the court first concluded that removal was proper because Bryan presented a federal question by directly challenging the terms of a tariff in her allegations that BellSouth's FUSC was excessive. Opinion at 11. The court then turned to BellSouth's motion to dismiss, explaining that the filed-rate doctrine, also known as the "filed-tariff doctrine," prohibits suits that would have the effect of altering the rates set forth in a carrier's filed tariff. *Id.* at 11-12. Based on this doctrine, the court dismissed those claims that it concluded arose under federal law by challenging the tariff. *Id.* at 13. The court then declined to exercise supplemental jurisdiction and remanded to state court those "remaining claims" that did not challenge the tariff and thus did not present federal questions.[4] *Id.* at 13-

4. The court did not specify which claims it viewed as "remaining state law claims." On appeal, the parties agreed at oral argument that the court's Order had the effect of dismissing Count B, the unjust enrichment/restitution claim, and Count C, the breach of contract claim, and remanding to state court Count A, the North Carolina unfair trade practices claim. Bryan has not appealed the dismissal of Counts B and C.

14. BellSouth appeals from the portion of the court's Order denying dismissal of Count A and remanding it to state court, maintaining that Count A, like Bryan's other two claims, challenged the tariff, arose under federal law, and should have been dismissed.

II.

We turn first to Bryan's assertion that we lack jurisdiction over this appeal. Bryan maintains that jurisdiction is lacking because the Order was "non-final," in that one of her claims was not dismissed. *See generally* 28 U.S.C. § 1291 ("The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . . ."). For this proposition, Bryan relies on Federal Rule of Civil Procedure 54(b), which provides that, "[w]hen more than one claim for relief is presented in an action, . . . the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only *upon an express determination* that there is no just reason for delay and upon an express direction for the entry of judgment." Fed. R. Civ. P. 54(b) (emphasis added). Bryan maintains that, as the court made no such express determination, its Order was not final and is not appealable.

Bryan's assertion does not withstand scrutiny. Admittedly, 28 U.S.C. § 1447(d) provides that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise. . . ." However, as the Supreme Court explained in *Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706 (1996), § 1447(d) refers only to those situations in which a court has directed a

remand for the reasons set forth in § 1447(c); that is, a defect in removal or lack of subject matter jurisdiction. *Quackenbush*, 517 U.S. at 711-12. The Court went on to explain that, where a district court has remanded a lawsuit to state court based on abstention principles, the remand is considered a final order appealable under 28 U.S.C. § 1291. *Id.* at 712-13.

In this situation, the district court explicitly based its remand of Count A on abstention principles, relying on 28 U.S.C. § 1367(c)(3). Opinion at 14. That section provides, "The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) [providing for supplemental jurisdiction over all claims forming the same case or controversy] if — the district court has dismissed all claims over which it has original jurisdiction. . . ." 28 U.S.C. § 1367(c)(3). And we have recognized that a remand order based on § 1367(c) is appealable as a final order pursuant to § 1291. *See Battle v. Seibels Bruce Ins. Co.*, 288 F.3d 596, 606 n.16 (4th Cir. 2002) (explaining that, under "well-settled precedent," remands based on § 1367(c) are appealable final orders under § 1291); *see also Hinson v. Norwest Fin. S.C., Inc.*, 239 F.3d 611, 614-15 (4th Cir. 2001). Because the court remanded Count A pursuant to § 1367(c), its decision constitutes an appealable final order, and we possess jurisdiction pursuant to 28 U.S.C. §1291.

III.

In this matter, the district court remanded Count A to state court because it determined that Count A did not give rise to federal question jurisdiction, and the court declined to exercise supplemental jurisdiction. A district court's determination that it lacks subject matter jurisdiction is a question of law that we review de novo. *Yarnevic v. Brink's, Inc.*, 102 F.3d 753, 754 (4th Cir. 1996).

IV.

Turning to the issues on appeal, our task is twofold. First, we must determine whether Bryan's North Carolina unfair trade practices claim arises under federal law, in which event the court erred in remanding it. *See Battle v. Seibels Bruce Ins. Co.*, 288 F.3d 596, 609 (4th Cir. 2002) (concluding that "the district court erred when it remanded the Remaining Claims . . . based upon its mistaken belief that it had otherwise dismissed all claims over which it had 'original jurisdiction'"). And if remand was error, we must determine whether Count A is barred by the filed-rate doctrine.

A.

First, with respect to the existence of federal jurisdiction, we recognize that when, as here, state law creates the plaintiff's cause of action, the lower federal courts possess jurisdiction to hear "only those cases in which a well-pleaded complaint establishes . . . that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Franchise Tax Bd. v. Constr. Laborers*

Vacation Trust, 463 U.S. 1, 27-28 (1983); *see also Mulcahey v. Columbia Organic Chems. Co.*, 29 F.3d 148, 151 (4th Cir. 1994).[5] And we are further cognizant that a filed tariff carries the force of federal law. *See MCI Telecomms. Corp. v. Garden State Inv. Corp.*, 981 F.2d 385, 387 (8th Cir. 1992) (observing that "federal tariffs are the law, not mere contracts"). As one of our sister circuits has explained, "[a] tariff filed with a federal agency is the equivalent of a federal regulation, and so a suit to enforce it, and even more clearly a suit to invalidate it as unreasonable under federal law . . . arise[s] under federal law." *Cahnmann v. Sprint Corp.*, 133 F.3d 484, 488 (7th Cir. 1998) (internal citations omitted).[6] A claim that seeks to alter the terms of the relationship between carrier and consumer set forth in a filed tariff therefore presents a federal question. *See Fax Telecommunicaciones Inc. v. AT & T*, 138 F.3d 479, 488 (2d Cir. 1998) (explaining that a claim "seeking to enforce the filed tariff provides a basis for federal question jurisdiction").

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5. Additionally, federal jurisdiction exists in those rare instances in which state law claims are completely preempted. *See Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 6-9 (2003) (explaining doctrine of complete preemption). Because we conclude that Bryan's cause of action presents a substantial question of federal law, we need not determine whether the doctrine of complete preemption applies.

6. Although the *Cahnmann* decision was rendered on the basis of complete preemption, which we need not reach, its statement that suits to enforce or invalidate tariffs arise under federal law is beyond dispute and does not depend on any preemption theory, nor do the authorities *Cahnmann* relies upon for this proposition. *See, e.g., Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 534-35 (1983) (concluding that suit to collect charges due under tariff gives rise to federal jurisdiction), *Louisville & Nashville R.R. v. Rice*, 247 U.S. 201, 203 (1918) (same).

Additionally, the filed-rate doctrine mandates that "the rate of the carrier duly filed is the only lawful charge." *AT & T v. Cent. Office Tel., Inc.*, 524 U.S. 214, 222 (1998) (quoting *Louisville & Nashville R.R. v. Maxwell*, 237 U.S. 94, 97 (1915)). The doctrine's purpose is twofold: to prevent discrimination among consumers and to preserve the rate-making authority of federal agencies.[7] *See Hill v. BellSouth Telecomms., Inc.*, 364 F.3d 1308, 1316 (11th Cir. 2004); *Marcus v. AT&T Corp.*, 138 F.3d 46, 58 (2d Cir. 1998). As the Eleventh Circuit recently observed, the filed-rate doctrine serves the purpose of non-discrimination by prohibiting a court from entering a judgment that would serve to alter the rate paid by a plaintiff. *Hill*, 364 F.3d at 1316. "Even if such a challenge does not, in theory, attack the filed rate," the court explained, "an award of damages to the customer-plaintiff would, effectively, change the rate paid by the customer to one below the filed rate paid by other customers." *Id.* We therefore cannot permit any claim to go forward that, if successful, would require an award of damages that would have the effect of imposing different rates upon different consumers. *See Marco Supply Co., Inc. v. AT & T Communications, Inc.*, 875 F.2d 434, 436 (4th Cir. 1989) ("[A] regulated carrier *must* charge the tariff rate established with the appropriate regulatory agency. . . . To do otherwise would be giving a preference to and discriminating in favor of the customer in question.") Similarly, authorizing a court

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7. In fact, the Federal Communications Act itself explicitly serves these purposes, providing that "no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation . . . than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified. . . ." 47 U.S.C. § 203(c).

to award damages that would effectively impose a rate different from that dictated by the tariff would usurp the FCC's authority to determine what rate is reasonable. *See Hill*, 364 F.3d at 1317. In sum, we must determine whether Count A of the Complaint would require the court to determine a reasonable rate for the FUSC, thereby presenting a substantial question of federal law and contravening the filed-rate doctrine.[8]

B.

Against this backdrop, we now assess whether Count A of the Complaint effectively challenges the reasonableness of BellSouth's filed rate, giving rise to federal question jurisdiction and requiring dismissal pursuant to the filed-rate doctrine. Because only the FCC may decide what charge is lawful, it is beyond dispute that the court was correct to

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8. We do not imply, as the dissent suggests, that the filed-rate doctrine is "coterminous with the scope of federal question jurisdiction." *See infra* p. 16. *Fax Telecommunicaciones* indeed provides an instance in which a claim did not raise a federal question but was barred by the filed-rate doctrine. *Fax Telecommunicaciones*, 138 F.3d at 486-90 (holding that claim alleging breach of contract in which carrier agreed to charge plaintiff different rate than that set forth in tariff did not raise substantial federal question, but contract could not be enforced due to filed-rate doctrine). In certain circumstances, however, the inquiries merge. As the dissent recognizes, "claims requiring the court to second-guess the reasonableness of [the FCC's rate] determination are properly said to require the court to resolve a substantial question." *Infra* p. 17. And claims requiring a court to make that assessment also run afoul of the filed-rate doctrine, such that both questions can be resolved by the same inquiry.

exercise jurisdiction and dismiss Bryan's claims complaining that the FUSC was excessive. The parties disagree, however, as to whether Count A also presents a forbidden challenge to Bell-South's tariff. BellSouth maintains that it does, asserting that, because Count A seeks damages, the court, were Bryan successful, would be put in the position of effectively refunding a portion of the FUSC to Bryan. In the circumstances presented, we are constrained to agree.

In Count A, Bryan alleges that BellSouth's charging and collecting of the FUSC and its failure to make certain disclosures in connection therewith constitute unfair or deceptive acts or practices under North Carolina General Statute section 75-1.1. In Part V of her Complaint, titled "DAMAGES," Bryan alleges, "BellSouth's actions and omissions have been an actual, producing, direct and proximate cause of damages to Plaintiff and to BellSouth's other North Carolina customers in an amount exceeding $10,000." Complaint ¶ 31. Bryan's prayer for damages draws no distinction between her separate counts. With no indication to the contrary, we must view Part V as seeking monetary damages for the acts alleged in Count A.

BellSouth asserts that the monetary remedy Bryan seeks is "a refund of that portion of the FUSC that she considers she was wrongfully induced to pay" and that, in seeking such a remedy, Bryan runs afoul of the filed-rate doctrine. In actuality, Bryan does not specify the nature of her damages in Count A. Nonetheless, BellSouth maintains that any award of damages flowing from BellSouth to Bryan, no matter how calculated, would violate the filed-rate doctrine by refunding a portion of the FUSC to some consumers but not to others

and by requiring the court to determine a reasonable rate. Certainly, this proposition finds support in the decisions of our sister circuits. *See, e.g., Hill*, 364 F.3d at 1317 ("Hill's two remaining claims implicate the filed rate doctrine because she seeks purely monetary damages as relief."); *Marcus*, 138 F.3d at 60-62 (barring claim for compensatory damages because plaintiffs would effectively receive discounted rate and because award would undermine authority of FCC, which had approved billing practice in question). In the circumstances presented here, we need not — and do not — decide whether every award of compensatory damages would serve to challenge a carrier's tariff.

In our view, the Complaint — read in the light most favorable to the plaintiff — nowhere purports to seek any form of damages other than a refund of some portion of the FUSC. And it pleads no facts that would put BellSouth on notice that Bryan intends to seek damages resulting from any injury other than paying the FUSC. In the "FACTS" section of the Complaint, Bryan alleges only that she is a BellSouth customer who was charged and paid the FUSC, that BellSouth charged an FUSC that was excessive, that it failed to disclose how the FUSC was calculated, and that its use of the term "FUSC" was misleading. Complaint ¶¶ 4-8.[9]

9. At oral argument, BellSouth placed significant weight on the fact that Bryan's class action allegations identify only one issue of law or fact common to the class: "[w]hether BellSouth charges an excessive Federal Universal Service Charge to its North Carolina customers." Complaint ¶ 11. The question of whether Bryan has pleaded facts sufficient to support class certification, however, is distinct from that of whether her Complaint as a whole seeks an impermissible form of damages.

At argument, Bryan asserted that one could envision an award of damages that would not challenge the filed tariff. She posited that if BellSouth had fully disclosed all information pertaining to its FUSC, she might have chosen a different carrier that would have charged a lower FUSC, and therefore she would have been damaged in the amount of the difference between the two carriers' FUSCs. Such an award of damages, Bryan maintained, would not require the court to determine the reasonableness of BellSouth's FUSC and therefore would neither present a federal question nor be barred by the filed-rate doctrine. This example is purely hypothetical, however, and nothing in the Complaint suggests such an injury.[10]

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10. Our dissenting colleague asserts that our analysis disregards the rule explained in *Dixon v. Coburg Dairy, Inc.*, 369 F.3d 811, 816-17 (4th Cir. 2004), that federal jurisdiction is lacking if there exists any legal theory by which the plaintiff can sustain his claim without raising a substantial question of federal law. We recognize this rule, of course, but it has no application in this situation. In *Dixon*, as in the decisions on which it relies, *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800 (1988), and *Mulcahey*, 29 F.3d 148, the courts found alternative theories of recovery on the face of the complaint itself. *See Dixon*, 369 F.3d at 817-18 (concluding, "[a]fter considering Dixon's complaint as a whole," that "Dixon's complaint could support a finding of liability . . . under any of the following three theories . . ."); *Christianson*, 486 U.S. at 810 ("[A] claim supported by alternative theories in the complaint may not form the basis for § 1338(a) jurisdiction unless patent law is essential to each of those theories."); *Mulcahey*, 29 F.3d at 153 ("Examination of the complaint ... reveals that the negligence *per se* claim citing the federal environmental statutes was only an alternative theory of liability. . . ."). None of these courts sought to conjure out of whole cloth an alternative theory of liability without some support in the allegations of the complaint, and we decline to do so here.

In sum, we conclude that the only plausible reading of the Complaint is that Count A, like the other counts, seeks a refund of a portion of the FUSC.[11] Because the amount of the FUSC is determinatively set forth in BellSouth's tariff, which carries the force of federal law, an action seeking to alter that rate presents a federal question. The district court therefore erred in remanding Count A to state court. And because Count A would require the court to determine a reasonable rate for the FUSC, that claim must be dismissed pursuant to the filed-rate doctrine.

V.

Pursuant to the foregoing, we vacate the district court's Order with respect to Count A and remand for that count to be dismissed.

VACATED AND REMANDED

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11. Because Count A seeks a damage award that presents a challenge to BellSouth's tariff, we need not reach BellSouth's other contentions; i.e., that Bryan's non-disclosure allegations challenge the tariff because Bryan is presumed to know the contents of the tariff, and that Count A is barred by the doctrine of primary jurisdiction.

Appendix A

LUTTIG, Circuit Judge, dissenting:

The majority holds that the plaintiff's state law cause of action against BellSouth for violation of the North Carolina Unfair Trade Practices Act, N.C. Gen.Stat. § 75-1.1, "arises under" federal law within the meaning of 28 U.S.C. § 1331 because it "effectively challenges" the rates set in BellSouth's filed tariff with the FCC. *Ante* at 430. Because this standard has no basis in the Supreme Court's precedent for determining whether statutory "arising under" jurisdiction exists, and because neither the plaintiff's right to relief nor the remedy that the plaintiff has requested entails resolution of any question of federal law, much less "necessarily depend[s] on the resolution of" such a question, I dissent.

A state law claim "arises under" federal law within the meaning of 28 U.S.C. § 1331 in only two circumstances. *Franchise Tax Bd. v. Constr. Laborers Vac. Trust*, 463 U.S. 1, 13, 27-28 (1983). The first circumstance, commonly referred to as "complete preemption," exists when "federal law so completely sweeps away state law that any action brought under state law is transformed into a federal action that can be brought originally in, or removed to, federal court." *King v. Marriott Int'l Inc.*, 337 F.3d 421, 425 (4th Cir. 2003) (citing *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63-64 (1987)). Our court has recently explained that in such cases, "in actuality, the plaintiff simply has brought a mislabeled federal claim, which may be asserted under some federal statute." *King*, 337 F.3d at 425; *see also Franchise Tax Bd.*, 463 U.S. at 13 (describing such state law claims as "'really' one[s] of federal law"). The second, and more common, circumstance under which a state law claim can

"arise under" federal law is "if a well-pleaded complaint establishe[s] . . . that [the plaintiff]'s right to relief under state law necessarily depends on resolution of a substantial question of federal law." *Franchise Tax Bd.*, 463 U.S. at 27-28; *Dixon v. Coburg Dairy, Inc.*, 369 F.3d 811, 816 (4th Cir. 2004). *Cf. Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 813 & n.12 (1986) (holding that, even where the plaintiff's right to relief required the resolution of a federal question, the district court did not have statutory federal question jurisdiction where the adjudication of the federal question "would [not] serve congressional purposes and the federal system.").

Because the majority finds jurisdiction under the second of these circumstances, it does not address the question of whether complete preemption is present. *See ante* at 429 n.5. There is simply no argument in this case, however, that federal jurisdiction through complete preemption exists. As we recently explained, "the 'touchstone' of complete preemption is 'whether Congress intended the federal cause of action' to be 'the exclusive cause of action' for the type of claim brought by a plaintiff." *King*, 337 F.3d at 425 (quoting *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 9 n.5 (2003)); *Marcus v. AT&T*, 138 F.3d 46, 54 (2d Cir. 1998) ("[A]fter *Metropolitan Life*, it is clear that the complete preemption doctrine applies only where Congress has clearly manifested an intent to disallow state law claims in a particular field."). For this reason,

> a vital feature of complete preemption is the existence of a federal cause of action that replaced the preempted state cause of action. *Where no*

> *discernable federal cause of action exists on a plaintiff's claim, there is no complete preemption*, for in such cases there no federal cause of action that Congress intended to be the exclusive remedy for the alleged wrong.

King, 337 F.3d at 425 (emphasis added). In light of this direction, the absence of a federal cause of action analogous to the plaintiff's state law NCUTPA claim is fatal to any argument for complete preemption. As the Second Circuit has concluded, "while the FCA does provide some causes of action for customers, it provides none for deceptive advertising and billing." *Marcus*, at 54; *compare*, *e.g.*, 47 U.S.C. § 203(c)(1), 207 (authorizing suit in federal district court to challenge carrier's collection of tariffs which are "greater or less or different" than those filed with the FCC).

Furthermore, even if the FCA did provide a cause of action for deceptive and misleading billing, complete preemption would still be lacking, because Congress clearly intended for there not to be complete federal preemption of plaintiff's state law causes of action. Indeed, the FCA contains a savings clause that provides that "nothing in the [FCA] shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." 47 U.S.C. § 414. *See also Metropolitan Life Ins. v. Taylor*, 481 U.S. 58, 65 (1987) (stating that "even with" the existence of a cause of action under § 502(a) of ERISA, the Court "would be reluctant to find that extraordinary pre-emptive power . . . that converts an ordinary state common law complaint into one stating a federal claim," without explicit evidence of

congressional intent from the legislative history); *Marcus*, 138 F.3d at 54 (finding that "[t]he FCA not only does not manifest a clear Congressional intent to preempt state law actions prohibiting deceptive business practices, false advertisement, or common law fraud, it evidences Congress's intent to allow such claims to proceed under state law.").[1]

Accordingly, if the district court possesses subject matter jurisdiction over the plaintiff's remaining state law claim, it must be on the more narrow ground that the plaintiff's right to relief, as set forth in her complaint, "necessarily depends on resolution of a substantial question of federal law." *Franchise Tax Bd.*, 463 U.S. at 13; *Interstate Petroleum Corp. v. Morgan*, 249 F.3d 215, 220 (4th Cir. 2001) (*en banc*).

The majority refuses even to apply this established standard for determining federal jurisdiction and adopts instead the different standard of whether a complaint "effectively challenges" a filed rate, *see ante* at 430 (emphasis added) (inquiring "whether Count A of the Complaint *effectively challenges* the reasonableness of BellSouth's filed rate"), a standard derived from cases that considered the applicability of the filed-rate doctrine as a defense to a particular claim, *see, e.g.*, *Brown v. MCI WorldCom Network Servs., Inc.*, 277 F.3d 1166, 1170 (9th Cir. 2002) (noting that

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1. For an example of a statement of congressional intent sufficient to completely preempt a state law claim, *see Metropolitan Life*, 481 U.S. at 65-66 (quoting a direct statement in the House Conference Report on ERISA that "all such actions in Federal or State courts are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947").

"the filed-rate doctrine also bars suits challenging services, billing, or other practices when such challenges, if successful, would have the effect of changing the filed tariff"); *Fax Telecommunicaciones Inc. v. AT & T*, 138 F.3d 479, 489 (2d Cir. 1998) (noting that "[i]f this court were to enforce the promised rate and award damages on that basis, we would effectively be setting and applying a rate apart from that judged reasonable by the FCC, in violation of the nonjusticiability strand of the filed rate doctrine."). The primary case on which the majority relies for its adoption of this standard, *Hill v. BellSouth Telecomms., Inc.*, 364 F.3d 1308 (11th Cir. 2004), commits without discussion the same mistake as the majority, using, for determination of the existence of federal jurisdiction, the standard developed to evaluate applicability of the filed-rate doctrine as a defense. *Id.* at 1315 (focusing its discussion on the applicability of the filed-rate doctrine, and noting simply that "federal question jurisdiction should have attached to Hill's two remaining state-law causes of action because they implicated the filed rate doctrine.").

This is error plain and simple. Notwithstanding the majority's obvious belief (as well as its disclaimer that it so believes), the filed-rate doctrine is not coterminous with the scope of federal question jurisdiction under section 1331; it is significantly broader. *See Fax Telecommunicaciones*, 138 F.3d at 487-90 (holding that the plaintiff's breach of contract claim did not "arise under" federal law for the purposes of removal but that it was barred by the filed-rate doctrine). It is one thing to provide that "arising under" jurisdiction exists in that narrow class of cases where the plaintiff's right to relief necessarily depends on the resolution of a substantial

federal question or Congress ha preempted state court jurisdiction. It is quite another to provide that jurisdiction is present so long as the plaintiff's request for relief constitutes an "effective challenge" to the rate et by federal law. Indeed, as this case demonstrates, a claim can easily be characterized as an "effective challenge" to rates set in a tariff filed with a federal agency, even though the adjudication of the claim itself would require the court to decide no federal issues whatsoever. Of course, that a federal court may not have jurisdiction over a claim that would be barred by the filed-rate doctrine is not problematic in the least; the filed-rate doctrine may be raised as a federal defense to a state law claim before a state court just as easily as before a federal court. *See Fax Telecommunicaciones*, 138 F.3d at 486; *see also Merrell Dow*, 478 U.S. at 808 ("A defense that raises a federal question is inadequate to confer federal jurisdiction.") (citing *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149 (1908)).

It is clear that the plaintiff's claim does not meet the standard that we must apply, and have consistently applied, in such cases: whether the plaintiff's right to relief, as set forth in "a well-pleaded complaint," "necessarily depends on resolution of a substantial question of federal law." *See Franchise Tax Bd.*, 463 U.S. at 13; *Interstate Petroleum Corp. v. Morgan*, 249 F.3d 215, 220 (4th Cir. 2001) (*en banc*). To prevail on a claim under the NCUTPA, N.C. Gen.Stat. 75-1.1, a plaintiff must prove "'(1) an unfair or deceptive act or practice, or unfair method of competition, (2) in or affecting commerce, and (3) which proximately caused actual injury to the plaintiff or his business.'" *See, e.g., Basnight v. Diamond Developers, Inc.*, 14 F. Supp. 2d 754, 764

(M.D.N.C. 2001). None of these elements has anything whatsoever to do with federal law. Moreover, there can be no argument that the plaintiff's claim is, in fact, a claim based on the tariff, which simply has been artfully pled under the NCUTPA; as counsel for BellSouth conceded at argument, the allegedly unfair and deceptive billing and marketing practices at the heart of plaintiff's NCUTPA claim are not addressed in the tariff. *Compare Marcus*, 138 F.3d at 56, *with Fax Telecommunicaciones*, 138 F.3d at 487.

The majority maintains that the plaintiff's claim presents a federal question because "the only plausible reading of the Complaint is that [the count alleging a violation of the NCUTPA] . . . seeks a refund of a portion of the FUSC" and such a refund would require the court to "alter th[e] rate" set forth in the tariff. *Ante* at 432. This contention is simply wrong, for two reasons. First, even if the Complaint were so read, it would not present a federal question. Second, the court is not *necessarily* required to impose a different rate or to refund a portion of the rate in order to award damages to the plaintiff, as there are other viable theories of damages under the plaintiff's Complaint.

As to the first, the determination of a damage award with reference to the tariff rate charged by BellSouth does not pose a federal question. The tariffs BellSouth has filed with the FCC represent a judgment by the government that the FUSC rates included therein are reasonable. For that reason, claims requiring the court to second-guess the reasonableness of this determination are properly said to require the court to resolve a substantial federal question. However, the calculation of damages for the injury caused to the plaintiff

by BellSouth's violation of the NCUTPA does not require the court to make any determination about the reasonableness of the rate charged in the tariff. *Compare Fax Telecommunicaciones*, 138 F.3d at 487 (finding no federal question jurisdiction over breach of contract claim where the basis for the claim was "independent of the rate on file with the FCC"). Rather, it seeks to measure the injury caused by Bell-South's omissions and misrepresentation. Put another way, even if the plaintiff's damages are characterized as a "refund" of a portion of the FUSC paid by BellSouth, the amount of the "refund" may only be permissibly determined by reference to BellSouth's misconduct and the plaintiff's reliance on that misconduct. Even if the *consequence* of awarding such damages would be to *effectively* lower the rates for some customers and not for others, the determination of damages would not "necessarily depend" on the court's determination of the reasonableness of the rate, but rather on its determination of the extent to which the billing and marketing practices of BellSouth violated the NCUTPA.

As to the second reason, even if a claim by the plaintiff that she was entitled to a "refund of a portion of the FUSC" would require a federal court to reconsider the reasonableness of a filed rate and thus would pose a federal question, it is incorrect to say that the plaintiff's claim *necessarily* depends on awarding a "refund of a portion of the FUSC." *See Dixon*, 369 F.3d at 816 ("A plaintiff's right to relief for a given claim necessarily depends on a question of federal law only when *every* legal theory supporting the claim requires the resolution of a federal issue."). The majority maintains that the Complaint must be read to request a refund because "the Complaint — read in the light most favorable to the

plaintiff — nowhere purports to seek any form of damages other than a refund of some form of the FUSC" and otherwise fails to put BellSouth on notice of the plaintiff's intent to do so. *Ante* at 431. However, the plaintiff's Complaint cannot plausibly be read to set forth *any* theory of damages,[2] let alone a single exclusive request for "a refund of some portion of the FUSC." *Ante* at 431.

And, in fact, plaintiff's counsel at argument proposed an example of a plausible mechanism for determining damages that does not challenge the amount of the filed tariff: the difference between the FUSC charged by BellSouth and the FUSC for the carrier that Plaintiff might have chosen absent BellSouth's lack of disclosure. The majority dismisses this method of computing damages as "purely hypothetical" and asserts that "nothing in the Complaint suggests such an injury." *Ante* at 431. But looking solely to the plaintiff's Complaint, it is no more "hypothetical" that the plaintiff will seek to prove damages by demonstrating that "she might have chosen a different carrier that would have charged a lower FUSC," *ante* at 431, than it is that she will seek damages of "a portion of the FUSC" that she has already paid to BellSouth. *Ante* at 432.

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2. As it pertains to damages, the plaintiff's Complaint alleges that "Bell-South's actions and omissions have been an actual, producing, direct and proximate cause of damages to Plaintiff and to BellSouth's other North Carolina customers in an amount exceeding $10,000.00," J.A. 22 (Complaint ¶ 31), and provides that the plaintiff is entitled to treble damages under section 75-16 of the NCUTPA for BellSouth's unfair and deceptive trade practices. *Id.* (Complaint ¶ 32).

Thus, because the plaintiff could prove damages under at least one theory that does not require resort to any concept of federal law, her claim does not "arise under" federal law within the meaning of section 1331. *Dixon*, 369 F.3d at 817 ("[I]f the plaintiff can support [her] claim with even one theory that does not call for an interpretation of federal law, [her] claim does not 'arise under' federal law for purposes of § 1331.").

The majority argues that *Dixon* is inapposite because in it and the cases on which it relies, "the courts found alternative theories of recovery on the face of the complaint itself," rather than "conjur[ing] out of whole cloth an alternative theory of liability without some support in the allegations of the complaint." *Ante* at 431-32 n.10. The theory of liability proposed by plaintiff's counsel, however, no more lacks support in the allegations of the complaint than does the majority's "refund" theory. Plaintiff's Complaint, which complains of omissions and misrepresentations, *see* Complaint ¶¶ 19-24, would clearly support a theory that those actions led the plaintiff to purchase a service she would not have otherwise purchased. If anything, that theory is more clearly supported in the allegations of the Complaint than the theory that plaintiff seeks a refund of the portion of the rate that is unreasonable, a theory that has little if any direct connection to the allegations in the Complaint.

It is not only the case, then, that pursuing a refund of a portion of the rate would not *necessarily* depend on resolution of a federal question, if the claim for a refund did not rest solely on the reasonableness of the rate. Even if pursuing a refund did depend on resolution of a federal question, it is

implausible to read the Complaint so narrowly as to define that remedy as the only supportable calculation of damages.

In sum, the majority's analysis of the district court's subject matter jurisdiction under 28 U.S.C. § 1331 fails to heed even the most basic tenets of the Supreme Court's or this court's direction on the subject, adopting a standard drawn from a possible federal defense to plaintiff's claim, rather than from whether plaintiff's right to relief, as set forth in her Complaint, "necessarily depends on a question of federal law." Under the correct standards, there is no basis on which it may be said that the district court possessed "arising under" jurisdiction over the plaintiff's state law claim pursuant to 28 U.S.C. § 1331. I dissent from the majority's contrary judgment.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA DATED AND FILED FEBRUARY 6, 2003

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

CIVIL NO. 1:02CV00228

TOMI WHITE BRYAN, individually and on behalf of all others similarly situated,

Plaintiff,

v.

BELLSOUTH TELECOMMUNICATIONS, INC.,

Defendant.

MEMORANDUM OPINION

BULLOCK, J.

On February 22, 2002, Tomi White Bryan ("Plaintiff") filed suit in the General Court of Justice, Superior Court Division, Guilford County, North Carolina, against BellSouth Telecommunications, Inc. ("Defendant") alleging three state law causes of action. Defendant removed the case to federal court based on federal question and diversity jurisdiction.

Appendix B

This matter is before the court on a motion to remand the case to state court by Plaintiff and a motion to dismiss by Defendant pursuant to Federal Rule of Civil Procedure 12(b)(6). For the following reasons, the court will grant Plaintiff's motion to remand in part, deny Plaintiff's motion to remand in part, grant Defendant's motion to dismiss in part, and deny Defendant's motion to dismiss in part. The ultimate result, arrived at in a way which might be perceived as cumbersome, but in the court's opinion necessary, is that Plaintiff's surviving claims are returned to state court.

FACTS

Defendant is a provider of telecommunications services and is subject to federal regulation as a common carrier under the Federal Communications Act of 1934, as amended ("FCA"), 47 U.S.C. §§ 151 *et seq.* Pursuant to federal regulation, Defendant is required to contribute a percentage of its revenue to the federal Universal Service Fund ("USF"). The USF provides funding for telecommunications services to rural areas, schools, libraries, and health care providers. Federal regulations permit Defendant to recover the costs related to its contributions to the USF through an itemized charge. The charge is classified on the customer's bill as the Federal Universal Services Charge ("FUSC"). Defendant's FUSC is set forth in the federal tariff that it files with the Federal Communications Commission ("FCC"). The tariff specifies the amount that Defendant charges as well as how the charge is calculated.

Plaintiff filed the present class action challenging Defendant's collection of an excessive FUSC from North

Carolina consumers. In addition to challenging the collection of an excessive FUSC, Plaintiff challenges the imposition of any charge without full disclosure to consumers of all the material facts surrounding the charge. Plaintiff's first amended complaint includes three causes of action: (1) a claim for violation of the North Carolina Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat. § 75-1.1; (2) a claim for unjust enrichment and restitution; and (3) a claim for breach of contract, including the covenant of good faith and fair dealing.

DISCUSSION

I. *Motion to Remand*

A cause of action filed in state court, which originally could have been filed in federal court, may be removed to federal court pursuant to 28 U.S.C. § 1441. The removing party has the burden of establishing the existence of federal subject matter jurisdiction. *Mulcahey v. Columbia Organic Chems. Co.*, 29 F.3d 148, 151 (4th Cir. 1994). "If federal jurisdiction is doubtful, a remand is necessary." *Id.* Where there is no diversity jurisdiction, federal question jurisdiction is required for removal.[1] *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987).

1. In Defendant's notice of removal, it indicated that this court had both diversity and federal question subject matter jurisdiction. Plaintiff acknowledges that there is complete diversity of citizenship, but contends that the amount in controversy is below the $75,000.00 threshold. Plaintiff's first amended complaint limits the damages she seeks to less than this amount. Accordingly, there is no diversity jurisdiction because Plaintiff does not seek damages that meet the amount in controversy threshold.

Appendix B

In determining the existence of subject matter jurisdiction based on federal question jurisdiction, the "well-pleaded complaint" rule applies. Under the well-pleaded complaint rule, "federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Id.* (citing *Gully v. First Nat'l Bank*, 299 U.S. 109, 112-13 (1936)). As a result, the plaintiff, as the master of the claims, "may avoid federal jurisdiction by exclusive reliance on state law." *Id.*

Plaintiff argues that her complaint presents no federal questions. Plaintiff's amended complaint alleges three claims, all of which facially are state law claims. Thus, applying the well-pleaded complaint rule, Plaintiff's complaint on its face presents no federal question. Defendant, however, contends that Plaintiff's claims raise a federal question and jurisdiction in this court is proper.[2]

2. Defendant argues that because Plaintiff's claims implicate the terms and rights under a federal tariff, her state law claims are preempted under the filed-rate doctrine; and because the filed-rate doctrine preempts her claims, her claims present a federal question. While the filed-rate doctrine does preempt claims seeking to alter the terms and conditions of a federal tariff, *AT & T v. Central Office Tel., Inc.*, 524 U.S. 214, 229 (1998), the doctrine itself does not provide an independent basis for federal jurisdiction. It is certainly possible that some or all of Plaintiff's claims will be preempted by the filed-rate doctrine, and therefore ultimately be governed by federal law. The filed-rate doctrine, however, is an affirmative federal defense. *Id.; see also Braco v. MCI WorldCom Communications, Inc.*, 138 F. Supp. 2d 1260, 1269 (C.D. Cal. 2001); *Minnesota v. WorldCom, Inc.*, 125 F. Supp. 2d 365, 371 n.6 (D. Minn. 2000). And it is "settled law that a case may *not* be removed to federal court on the basis of a federal defense, including the defense of pre-emption." (Cont'd)

Appendix B

A corollary to the well-pleaded complaint rule is the "artful pleading" doctrine. As previously stated, the plaintiff is the master of her claims. Thus, if a plaintiff elects not to assert a federal claim, the defendant cannot remove the action to federal court. However, "removal will be held proper when the plaintiff has concealed a legitimate ground of removal by . . . artful pleading." 14B Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 3721, at 332-33 (3d ed. 1998). Under this doctrine, "a court is permitted to look behind a complaint to determine whether a plaintiff is attempting to conceal the federal nature of [her] claim." *In re Wireless Tel. Radio Frequency Emissions Prod. Liab. Litig.*, 216 F. Supp. 2d 474, 492 (D. Md. 2002). Therefore, "the plaintiff may be said to have engaged in 'artful pleading' . . . when [she] pleads . . . a . . . state cause of action the merits of which turn on an important federal question." Wright *et al.*, *supra* § 3721, at 333. Because Plaintiff's amended complaint on its face presents no federal question, the court must look behind the complaint to determine whether Plaintiff is attempting to conceal the federal nature of her claims.

Defendant argues that because Plaintiff is challenging its FUSC, which is set forth in a tariff filed with the FCC, her claims arise under federal law. In Plaintiff's brief in support of her motion to remand, Plaintiff adopted the

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(Cont'd)

Caterpillar, 482 U.S. at 393. Accordingly, while Defendant may ultimately be correct in its assertion that Plaintiff's claims are barred by the filed-rate doctrine, for the purpose of evaluating whether removal was proper, the filed-rate doctrine as a federal defense to Plaintiff's claims does not confer federal jurisdiction.

position that Defendant is no longer required to file a tariff, and therefore she can maintain her state law causes of action. Effective July 31, 2001, the FCC amended the federal regulation that required long distance carriers to set forth their rates and charges in tariffs. Prior to this de-tariffing, most state causes of action were preempted. Following the FCC's de-tariffing efforts, however, the full range of state consumer protection laws are now available to consumers. Operating under the belief that Defendant was no longer required to file a tariff, Plaintiff further stated that her "claims are limited to the recovery of excessive Federal Universal Service Fees paid to BellSouth after the effective date of detariffing." (Pl.'s Br. Supp. Mot. Remand at 7.)

Plaintiff's position regarding de-tariffing as it relates to Defendant, however, is incorrect. The FCC's decision to no longer require the filing of tariffs applies only to interexchange long distance providers. Defendant, however, is a local exchange carrier and is still subject to the regulation requiring the filing of tariffs. Plaintiff attempted to retreat from her earlier position by arguing that she is not contesting the rate charged, but instead is challenging the "imposition of any charge without full disclosure to customers of all of the material facts surrounding the charge." (Pl.'s Reply Br. Supp. Mot. Remand at 2.) Notwithstanding her assertions to the contrary, Plaintiff's amended complaint clearly indicates that she is challenging the FUSC collected by Defendant as excessive, in addition to her claims regarding Defendant's failure to disclose material information.

Because Plaintiff is challenging the FUSC as excessive, her claims are a direct challenge to the terms of the tariff

filed with the FCC. Plaintiff alleges that Defendant breached its contract with its customers by, *inter alia*, "charging . . . an excessive Federal Universal Service Charge." (First Am. Compl. ¶ 29(a).) Plaintiff also makes the same allegation in her unjust enrichment/restitution claim, which states that "BellSouth has imposed an excessive and unlawful Federal Universal Service Charge on North Carolina consumers." (*Id.* ¶ 26.)

" 'The legal relationship between [Defendant] and its customers is defined by the tariffs, which consist of the terms and conditions of the common carrier's service and rates, that [Defendant] is required to file and maintain with the' FCC under the FCA." *Marcus v. AT & T Co.*, 138 F.3d 46, 56 (2d Cir. 1998) (quoting *AT & T Co. v. City of New York*, 83 F.3d 549, 552 (2d Cir. 1996)). "Moreover, 'federal tariffs are the law, not mere contracts.' " *Id.* (quoting *MCI Telecomms. Corp. v. Garden State Inv. Corp.*, 981 F.2d 385, 387 (8th Cir. 1992)); *see also AT & T Co. v. City of New York*, 83 F.3d 549, 552 (2d Cir. 1996) (stating that filed tariffs "have the force of law and are not simply contractual"); *Carter v. AT & T Co.*, 365 F.2d 486, 496 (5th Cir. 1966) ("[A] tariff, required by law to be filed, is not a mere contract. It is the law."). Thus, "[a] tariff filed with a federal agency is the equivalent of a federal regulation, and so a suit to enforce it, and even more clearly a suit to invalidate it as unreasonable under federal law, . . . arise under federal law." *Cahnmann v. Sprint Corp.*, 133 F.3d 484, 488 (7th Cir. 1998) (citations omitted) (citing *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533 (1983) (per curiam) (holding federal question jurisdiction exists over suits involving filed tariff)); *see also In re Universal Serv. Fund Tel. Billing Practices*

Litig., No. 02-MD-1468, 2002 WL 31929179, at *11 (D.Kan. Dec. 19, 2002) (holding that claims challenging a carrier's USF contributions as "excessive, unfair, or otherwise unlawful" "raise substantial questions of federal law 'on which the outcome of [the] lawsuit turn" ').

Plaintiff challenges the rate of the FUSC as explicitly set forth in the tariff filed with the FCC, contending that the rate is excessive and unlawful. Such a challenge calls into question the validity and reasonableness of the tariff. Therefore, because a duly filed tariff has the force and effect of federal law and some of Plaintiff's claims challenge the rate explicitly specified in that tariff, these claims necessarily raise a substantial federal question over which federal courts may properly exercise jurisdiction.

In addition to Plaintiff's claims contesting Defendant's FUSC as excessive, she alleges claims that do not directly challenge the FUSC. Among the allegations unrelated to Plaintiff's direct challenge are claims that Defendant failed to disclose sufficient information about how the charges are calculated and that the charges include administrative expenses, costs, and/or profits. Furthermore, Plaintiff alleges that Defendant represented to its customers that the collected FUSC is paid to the USF, which she contends is a false statement. While claims that directly challenge the validity of a rate contained in a tariff raise a federal question, claims that challenge conduct as deceptive or misleading do not raise a federal question because their "adjudication [does] not require determining the validity of a tariff." *Cahnmann*, 133 F.3d at 488; *see, e.g.*, *In re Long Distance Telecomms. Litig.*, 831 F.2d 627 (2d Cir. 1987) (stating that claims for fraud

and deceit based on the defendants' failure to notify customers of billing practices did not raise a federal question); *Braco v. MCI WorldCom Communications, Inc.*, 138 F. Supp. 2d 1260 (C.D. Cal. 2001) (remanding claims for deceptive and misleading practices because claims did not raise a federal question); *Crump v. WorldCom, Inc.*, 128 F. Supp. 2d 549, 555 (W.D. Tenn. 2001) (remanding state law claims for deceptive practices because "conduct complained of . . . relates to misrepresentations . . . and is not a direct attack on rates"); *Minnesota v. WorldCom, Inc.*, 125 F. Supp. 2d 365, 371-72 (D. Minn. 2000) (remanding state law claims for deceptive trade practices because nothing in the complaint "require[d] a determination of whether the rates . . . filed with the FCC [were] valid or enforceable"); *Sanderson, Thompson, Ratledge & Zimny v. AWACS*, 958 F. Supp. 947, 955 (D. Del. 1997) (remanding claims challenging the defendant's failure to disclose its billing method because claims did not challenge the "reasonableness of [the defendant's] billing rates or its method of calculating those rates").

To the extent that Plaintiff's claims challenge Defendant's failure to disclose certain information and misrepresentations, these claims do not raise a federal question and are appropriately styled state law claims. Unlike Plaintiff's claims contesting the FUSC, these claims do not attack the validity of the tariff. Rather, Plaintiff is challenging the fact that Defendant did not disclose the true nature of the charge. Nevertheless, because Plaintiff's claims challenging the FUSC as excessive raise a federal question, jurisdiction over Plaintiff's remaining state law claims is proper under the court's supplemental jurisdiction. 28 U.S.C. § 1367.

Appendix B

II. *Motion to Dismiss*

Defendant argues that Plaintiff's claims should be dismissed as barred by the filed-rate doctrine. The "filed-rate" doctrine, also known as the "filed-tariff" doctrine, "forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority." *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 (1981). "Tariffs filed with the F.C.C. conclusively and exclusively control the rights and liabilities between a carrier and its customers" with respect to tariffed services unless and until the FCC finds the tariff unlawful. *MCI Telecomms. Corp. v. Graham*, 7 F.3d 477, 479 (6th Cir. 1993). One of the principles underlying the filed-rate doctrine is to preserve the "exclusive role of federal agencies in approving rates for telecommunications services that are 'reasonable' by keeping courts out of the rate-making process, . . . a function that the federal regulatory agencies are more competent to perform." *Marcus*, 138 F.3d at 58. Indeed, a direct attack upon a rate duly set forth in a tariff "would unnecessarily enmesh the courts in the rate-making process" and "unduly subvert the regulating agencies' authority." *Wegoland v. NYNEX Corp.*, 27 F.3d 17, 19, 21 (2d Cir. 1994) (citing *Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246 (1951)).

Plaintiff challenges as excessive the FUSC set forth in Defendant's tariff. Such a challenge can be characterized only as a direct attack on the validity and reasonableness of the rate. As a remedy to her claim that the FUSC is excessive, Plaintiff seeks compensatory damages. Apparently, these damages would be the difference between the actual rate paid

and some other rate determined by the court. Such judicial action, however, would undermine the regulatory agency's rate-making authority.

Defendant is required by law to file its tariff with the FCC. The tariff sets forth the rate of the FUSC. Once the tariff is approved by the FCC, it is by "definition reasonable unless and until the FCC, as the 'legislatively appointed regulatory bod[y] [with] institutional competence,' says otherwise." *Marcus*, 138 F.3d at 61 (quoting *Sun City Taxpayers' Ass'n v. Citizens Utils. Co.*, 45 F.3d 58, 62 (2d Cir. 1995)). The imposition of monetary damages, which Plaintiff seeks as her only remedy, however, would require the court to determine that the filed FUSC rate is unreasonable. The court would then be required to determine what the reasonable rate should be. Such a scenario would clearly subvert the authority of the FCC and undermine the regulatory regime, thus implicating the filed-rate doctrine. Accordingly, the court will dismiss, as barred by the filed-rate doctrine, Plaintiff's claims to the extent that they challenge the FUSC as excessive.

III. *State Law Claims*

Plaintiff's suit was properly removed because her claims challenging Defendant's FUSC as excessive raise a federal question over which this court had original jurisdiction. Plaintiff's remaining claims, which do not directly challenge Defendant's FUSC but rather challenge Defendant's failure to disclose material information, do not raise a federal question. Jurisdiction over these claims, therefore, is predicated upon the court's supplemental jurisdiction.

Appendix B

Section 1367(c)(3) provides a district court with discretion to dismiss a claim supported only by supplemental jurisdiction if it has dismissed all claims over which it had original jurisdiction. 28 U.S.C. § 1367(c)(3). Because this court will grant Defendant's motion to dismiss as to Plaintiff's claims challenging Defendant's FUSC under the filed-rate doctrine, the court, within its discretion granted pursuant to Section 1367(c)(3), will remand Plaintiff's remaining state law claims to the General Court of Justice, Superior Court Division, Guilford County, North Carolina.

CONCLUSION

For the reasons set forth in this opinion, the court will grant Plaintiff's motion to remand to the extent that her claims challenge Defendant's failure to disclose material information and deny Plaintiff's motion to remand to the extent that her claims challenge as excessive Defendant's FUSC which was duly filed in a tariff with the FCC. As to Defendant's motion to dismiss, the court will grant Defendant's motion to dismiss Plaintiff's claims contesting the FUSC under the filed-rate doctrine and deny Defendant's motion to dismiss Plaintiff's remaining state law claims.

An order in accordance with this memorandum opinion shall be entered contemporaneously herewith.

s/ Edward Bullock
United States District Judge

February 6, 2003

Appendix B

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT
OF NORTH CAROLINA**

CIVIL NO. 1:02CV00228

TOMI WHITE BRYAN, individually and on behalf of all others similarly situated,

Plaintiff,

v.

BELLSOUTH TELECOMMUNICATIONS, INC.,

Defendant.

ORDER

BULLOCK, J.

For the reasons set forth in the memorandum opinion filed contemporaneously herewith,

IT IS ORDERED that Plaintiff's motion to remand [Doc. # 9] is **GRANTED IN PART AND DENIED IN PART**. Plaintiff's motion to remand is **GRANTED** as to Plaintiff's claims which challenge Defendant's failure to disclose material information, and Plaintiff's claims which challenge Defendant's failure to disclose material information are **REMANDED** to the General Court of Justice, Superior Court Division, Guilford County, North Carolina. Plaintiff's motion

to remand is **DENIED** as to her claims which challenge as excessive Defendant's Federal Universal Services Charge which was duly filed in a tariff with the FCC.

IT IS FURTHER ORDERED that Defendant's motion to dismiss [Doc. # 14] is **GRANTED IN PART AND DENIED IN PART**. Defendant's motion to dismiss is **GRANTED** as to Plaintiff's claims contesting the Federal Universal Services Charge under the filed-rate doctrine, and Plaintiff's claims contesting the Federal Universal Services Charge under the filed-rate doctrine are **DISMISSED**. Defendant's motion to dismiss is **DENIED** as to Plaintiff's remaining state law claims.

s/ Edward Bullock
United States District Judge

February 6, 2003

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DENYING PETITION FOR REHEARING FILED AUGUST 24, 2004

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 03-1316
CA-02-228-1

TOMI WHITE BRYAN, individually and on behalf of all others similarly situated

Plaintiff - Appellee

v.

BELLSOUTH COMMUNICATIONS, INCORPORATED

Defendant - Appellant

On Petition for Rehearing and Rehearing En Banc

Appellee's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Appendix C

Entered for a panel comprised of Judge Luttig, Judge King, and Judge Gregory.

For the Court,

/s/ Patricia S. Connor
CLERK